FILE COPY

OCT 21 1

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No. 520

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

ERNEST CLEVE,
Mills Building, San Francisco,
Attorney for Petitioner.

Subject Index

Page

Petition for writ of certiorari 1

Brief in support of petition for writ of certiorari 6

The respondent violated the Interstate Commerce Act by failing to maintain a reasonable or any rate applicable to the transportation within the United States of the shipments in issue 6

Collection by the respondent of an unreasonable joint through rate which included in it transportation within the United States of property originating in a foreign country and destined to a point in the United States was a violation of the Interstate Commerce Act 12

Table of Authorities Cited

Pages

Armour Packing Co. v. U. S., 209 U. S. 56, 81 10

Atlantic Fish Co. v. C. N. R., 148 I. C. C. 533 ..... 9, 11

Black Horse Tobacco Co. v. I. C. R. R. Co., 17 I. C. C. 588 11

Boston & Maine R. Co. v. Hooker, 233 U. S. 97, 110 10

B. & O. S. W. R. R. Co. v. Settle, 260 U. S. 166 9

International Nickel Co v. Director General, 66 I. C. C. 627 11

Charles B. Justice Co. v. Holton I. R. Co., 153 I. C. C. 673 9, 11

Larrowe Milling Co. v. W. & L. E. R. R., 52 I. C. C. 145 ... 11

L. & N. R. R. Co. v. Maxwell, 237 U. S. 94, 97 10

Monarch Paper Co. v. C. P. Ry. Co., 53 I. C. C. 620 11

News Syndicate Co. v. N. Y. C., 275 U. S. 179 .....4, 6, 11, 12

Rub-No-More Co. v. Director General, 69 I. C. C. 23 12

San Diego Oil Products Corp. v. Holton I. R. Co., 164 I. C. C. 505 .....11, 12

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No.

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Now comes Lewis-Simas-Jones Company and respectfully petitions this Court to grant a writ of certiorari to the District Court of Appeal of the State of California, First Appellate District, Division Two, to remove therefrom, for review here, the record in the case therein No. 7280, wherein petitioner is plaintiff

and appellant and Southern Pacific Company is defendant and respondent, and states:

The complaint in this action was filed in the Superior Court of the City and County of San Francisco, State of California, and alleged that the respondent had delivered to petitioner at San Francisco, three carloads of cow peas, which the respondent in conjunction with the Southern Pacific Railroad Company of Mexico had transported under through bills of lading and joint through rate of $1.33 per 100 lbs. from Navojoa, Mexico; that the said joint through rate was named in a tariff filed with the Interstate Commerce Commission; that the said joint through rate was unjust and unreasonable to the extent that it exceeded 94¢ per 100 lbs.; that the Interstate Commerce Commission had duly made and entered an order directing respondent to pay petitioner a certain sum as reparation; and that the respondent had not paid. (R. 3, 4.) None of these allegations were denied in the answer. Respondent pleaded a variety of facts in avoidance, all of them directed to the ultimate point that the Commission was without jurisdiction. (R. 12 to 19.) The only fact pleaded by respondent which now appears material is the allegation in an amendment to the answer (R. 56) that respondent "maintained a rate applicable on cow peas, carloads, from the said international boundary line at Nogales, Arizona, to San Francisco, California, which rate would have been applicable for the transportation within the United States of the shipments mentioned in the complaint had the consignors or owners elected to consign the same to said international boundary line and had thence reshipped said cow peas from said

international boundary line to San Francisco; and that the Interstate Commerce Commission has not at any time found said local rate from the international boundary at Nogales, Arizona, to San Francisco, California, to be or to have been unjust or unreasonable, or otherwise in violation of law." There was no allegation in the answer as amended that the respondent maintained a reasonable or any rate applicable to the transportation within the United States of the shipments in issue which moved on through bills of lading from Navojoa to San Francisco.

The trial Court found that the respondent maintained and published a rate of $1.14½ per 100 lbs. on carload shipments of cow peas originating at Nogales, Arizona, and destined to San Francisco; that this rate was applicable to carload shipments of cow peas originating at the point where the lines of the Southern Pacific Railroad Company of Mexico and respondent touch the international boundary line at Nogales, Arizona, and destined to San Francisco; and was likewise applicable upon carload shipments of cow peas loaded into cars at any point upon or adjacent to the boundary line within the limits of the respondent's railroad yards at Nogales, Arizona, and destined to San Francisco; that the shipments in issue could have been transported by other means than by railroad to a point at the boundary line and there loaded into cars for movement over respondent's line; that the rate applicable upon shipments from such point upon the boundary line to San Francisco was the said rate of $1.14½ per 100 lbs.; that said rate of $1.14½ was reasonable and lawful for application upon carload shipments of cow peas from Nogales,

Arizona, including such shipments as might be loaded at any place within the railroad yard limits at that point, destined to San Francisco; and that the Interstate Commerce Commission had made no finding and had had no evidence before it regarding the reasonableness of said rate of $1.14½. The trial Court concluded as a matter of law that the Commission was without jurisdiction. (R. 66 to 69.) Petitioner appealed to the District Court of Appeal of the State of California, First Appellate District, the judgment was affirmed (289 Pac. 643), and a petition for rehearing was denied on July 15, 1930. Petitioner then applied to the Supreme Court of the State of California for a hearing, in accordance with the laws of the State of California, which application was denied on August 14, 1930.

The reasons relied on for the allowance of the writ are as follows:

First: The decision of the Court below is contrary to the decision of this Court in *News Syndicate Co. v. N. Y. C.*, 275 U. S. 179.

Second: The decision of the Court below denies to the Interstate Commerce Commission a jurisdiction which that Commission has regularly asserted and exercised for more than twenty years and is still asserting and exercising. A decision from this Court upon the points involved is necessary to settle the conflict between the Commission and the State Courts of California with regard to the Commission's jurisdiction.

Third: The decision of the Court below prevents the exercise by the Interstate Commerce Commission

of any effective control over charges maintained or collected by railroads in the United States for the transportation within the United States of property which originates in a foreign country and is destined to a point in the United States, or which originates in the United States and is destined to a point in a foreign country, or which originates in the United States and is transported through a foreign country to a destination in the United States.

Dated, San Francisco,
October 11, 1930.

Respectfully submitted,
ERNEST CLEWE,
Attorney for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No.

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE RESPONDENT VIOLATED THE INTERSTATE COMMERCE ACT BY FAILING TO MAINTAIN A REASONABLE OR ANY RATE APPLICABLE TO THE TRANSPORTATION WITHIN THE UNITED STATES OF THE SHIPMENTS IN ISSUE.

The pertinent provisions of paragraphs 1, 2 and 5 of Section 1, and paragraphs 6 and 7 of the Interstate Commerce Act are quoted in appendix to this brief.

In *News Syndicate Co. v. N. Y. C.*, 275 U. S. 179 the following questions of law were certified to this

Court by the United States Circuit Court of Appeals for the Seventh Circuit:

"1. Where a railroad of the United States and a railroad of the Dominion of Canada unite in the publication of a joint through rate from a point within the Dominion of Canada to a point within the United States, the rate covering transportation both in Canada and in the United States, has the Interstate Commerce Commission of the United States jurisdiction, on complaint of a shipper or consignee made against the United States railroad alone, to determine the reasonableness of such joint through rate?

"2. Where a shipper or consignee of freight shipped to it at a destination in the United States from such point in the Dominion of Canada has paid at destination to the United States railroad the full published joint through freight rate thereon, has the Interstate Commerce Commission, upon a finding by it that such joint through rate was unreasonable and unjust, but in the absence of a finding that the charges for the transportation in so far as it took place within the United States were unjust and unreasonable, jurisdiction to make an order for the payment of damages to such shipper or consignee in the amount that the entire transportation charges on the basis of the joint through freight rate exceeded the charges which would have been assessed on the basis of the joint through freight rate found by the Commission to have been reasonable?

"3. When the Interstate Commerce Commission had made such an order against the United States carrier alone for the payment of damages

arising from its finding of the unreasonableness of such published joint through rate, can a suit thereon, under section 16 of the Interstate Commerce Act, be maintained solely against the United States carrier?

"4. Did the District Court err in sustaining the demurrer to the said petition?"

We quote the following verbatim from the decision of this Court:

"Question 1 is answered 'Yes, for the ascertainment of damages.'

Question 2 is answered 'Yes.'

Question 3 is answered 'Yes.'

Question 4 is not answered."

These questions and answers, standing alone, afford a complete and affirmative answer to the Commission's jurisdiction in this case. However, this Court's conclusions in the case cited were reached in the light of the fact that the carriers there had violated the Interstate Commerce Act by failing to make or publish any rate applicable to that portion of the transportation there involved which was within the United States. In the instant case the respondent maintained a rate on cow peas from the international boundary line to San Francisco, but your petitioner claims that as a matter of law this rate was not applicable to the transportation within the United States of the shipments in issue or to the transportation within the United States of any shipments of cow peas originating at Navojoa, Mexico, and transported on through

bills of lading via Nogales to San Francisco. The allegation in the amendment to the answer is that this rate from the boundary would have been applicable if the shipments had been consigned to and from the international boundary line on separate bills of lading, necessarily implying thereby that this rate from the boundary was not applicable to the transportation within the United States of shipments moving on through bills of lading. (R. 56.) Likewise, there is no finding or expressed conclusion by the trial Court or by the District Court of Appeal that this rate from the boundary was applicable to the transportation within the United States of the shipments in issue. The reason petitioner contends that the rate from the boundary line to San Francisco was not as a matter of law applicable to the transportation within the United States of shipments moving on through bills of lading from Navojoa to San Francisco is that the respondent had filed with the Interstate Commerce Commission a joint through rate for such shipments, and where a joint through rate is established no other rate can be applied. (*B. & O. S. W. R. R. Co. v. Settle,* 260 U. S. 166.) The case cited did not involve international joint through rates, but the underlying principle involved is nevertheless the same, and the Interstate Commerce Commission holds that the same rule is applicable to such rates.

Charles B. Justice Co. v. Holton I. R. Co., 153 I. C. C. 673;

Atlantic Fish Co. v. C. N. R., 148 I. C. C. 533.

Furthermore, this Court has repeatedly said that the central and controlling purpose of the Act was

that there should be only one rate for similar carriage of freight, which rate must be charged.

Armour Packing Co. v. U. S., 209 U. S. 56, 81;
Boston & Maine R. Co. v. Hooker, 233 U. S. 97. 110;
L. & N. R. R. Co. v. Maxwell, 237 U. S. 94, 97.

It is obvious that since the respondent did not charge the rate of $1.14½ for the transportation within the United States of the shipments in issue, that rate could not have been applicable to that transportation. There could have been but one applicable rate, and if the rate of $1.14½ had been applicable the respondent would have been in violation of the Act by failing to charge it.

Your petitioner contends that there are no exceptions whatever to the duty of a railroad to maintain and to charge a reasonable rate for all property which it may transport within the United States, when originating in a foreign country and destined to a point in the United States. If a railroad in the United States engages in the transportation on through bills of lading of property originating in a foreign country and destined to a point in the United States, that railroad is bound to maintain and to charge a reasonable rate applicable to the transportation within the United States of such shipments, and it is not a full and complete compliance with the Act for a carrier to establish a reasonable rate which is applicable to other shipments, but not applicable to shipments which that carrier is engaged in transporting on through bills of lading. Having failed to maintain a reasonable rate applicable to the transportation

within the United States of the shipments in issue, the respondent here was guilty of the same violation of the Act of which the carriers were guilty in the *News Syndicate Co.* case. The fact that respondent maintained a reasonable rate for the transportation within the United States of other shipments, not transported on through bills of lading, does not alter the fact that the respondent had engaged in the business of transporting shipments on through bills of lading and was, therefore, bound to maintain and to charge a reasonable rate applicable to the transportation within the United States of such shipments.

In conclusion upon this point, the Interstate Commerce Commission holds that under the decision of this Court in the *News Syndicate Co.* case, the Commission has jurisdiction to award reparation in cases of the kind here presented.

Atlantic Fish Co. v. C. N. R., 148 I. C. C. 533;
Charles B. Justice Co. v. Holton I. R. Co., 153 I. C. C. 673;
San Diego Oil Products Corp. v. Holton I. R. Co., 164 I. C. C. 505.

This jurisdiction is one which the Commission has regularly exercised for over twenty years.

Black Horse Tobacco Co. v. I. C. R. R. Co., 17 I. C. C. 588;
Larrowe Milling Co. v. W. & L. E. R. R., 52 I. C. C. 145;
Monarch Paper Co. v. C. P. Ry. Co., 53 I. C. C. 620;
International Nickel Co. v. Director General, 66 I. C. C. 627;

Rub-No-More Co. v. Director General, 69 I. C. C. 23.

Prior to the decision of this Court in the *News Syndicate Co.* case there was considerable disagreement among the members of the Commission with regard to its jurisdiction in these cases, the majority however always holding in favor of the Commission's jurisdiction, but since the decision in the *News Syndicate Co.* case we find only one dissenting opinion, that of Commissioner Woodlock, in *San Diego Oil Products Corp. v. Holton I. R. Co.*, 164 I. C. C. 505. Commissioner Woodlock dissented without any expression of the views or reasoning upon which his dissent was based.

COLLECTION BY THE RESPONDENT OF AN UNREASONABLE JOINT THROUGH RATE WHICH INCLUDED IN IT TRANSPORTATION WITHIN THE UNITED STATES OF PROPERTY ORIGINATING IN A FOREIGN COUNTRY AND DESTINED TO A POINT IN THE UNITED STATES WAS A VIOLATION OF THE INTERSTATE COMMERCE ACT.

The decision which we seek to have reviewed is predicated upon the conclusion of the Court below that the respondent had not violated the Interstate Commerce Act in any respect whatever (289 Pac. 645). The respondent has argued that your petitioner and all shippers are given an opportunity to secure a reasonable rate for transportation within the United States so long as the carriers maintain a reasonable rate from the international boundary line to the destination in the United States. In the *News Syndicate Co.* case this Court held that the carriers within the United States were bound to accord shippers that

opportunity, but this Court did not say or infer that the obligations of the carriers within the United States ended there. It is here we believe that the Court below fell into its outstanding error in interpreting the decision in the *News Syndicate Co.* case as holding that the sum total of the obligations of the carriers in the United States is to maintain lawful rates to and from the international boundary line without regard to whether the rates actually charged are lawful. The Interstate Commerce Act goes further than merely to require that the carriers in the United States shall afford shippers an opportunity to secure lawful rates. The Act places the burden squarely upon the carriers themselves of seeing to it that in every case the charges actually collected are lawful, regardless of how many opportunities the shipper may have had to secure lawful rates. Paragraph 5 of Section 1 requires not only that the carriers shall maintain reasonable charges for services "to be rendered" but also requires that charges shall be reasonable for services "rendered." A carrier may comply with its obligation to maintain lawful rates for services "to be rendered" merely by according shippers an opportunity to secure lawful rates, but the carrier has not fulfilled its obligation to make a lawful charge for services "rendered" unless the charge actually made for that service is lawful.

If an international joint through rate, established by an American railroad in conjunction with a foreign carrier, is free from the requirements of Paragraph 5 of Section 1 of the Act, then such a rate is free from all of the requirements of the Act. It

would obviously be impossible to say that such a rate is free from the requirements of Paragraph 5 of Section 1 of the Act but nevertheless subject to the requirements of Paragraph 1 of Section 3 or Paragraphs 6 and 7 of Section 6. Paragraph 1 of Section 3, to which we have referred, prohibits the granting of undue preferences or advantages as between persons, localities or commodities, and Paragraphs 6 and 7 of Section 6 require carriers subject to the Act to publish and file their rates with the Commission and to collect the rates so published and filed. No distinction with regard to the Commission's jurisdiction, can be made as between transportation of imports, transportation of exports, and transportation of property originating in the United States and transported through a foreign country to a destination in the United States. We will here cite illustrations of some of the things which result, if it be held that these international joint through rates are not subject to the pertinent requirements of the Act. First, railroads in the United States may lawfully join with Canadian railroads in through rates from St. Louis to Montreal which are grossly prejudicial in comparison with rates from Chicago to Montreal. In such a situation, of what practical use would it be that the rates from Chicago and from St. Louis to the international boundary line might be entirely free from undue prejudice, if the rates actually charged were prejudicial? Second, railroads in the United States may lawfully join in through rates from Montreal to St. Louis on shipments consigned to X Co. with higher rates from Montreal to St. Louis on shipments consigned to Y Co. Of what use would

it be that the rates from the international boundary line to St. Louis might be lawful in every respect if the rates actually charged to Y Co. were higher than the rates charged to X Co.? Third, the Commission may wish to fix minimum rates from Seattle, Wash., to Detroit, Mich., but will be unable to effectually exercise its powers in that direction because of the availability of routes from Seattle to Detroit which operate through Canada, inasmuch as joint through rates over such routes would be free from the requirements of the Act or the jurisdiction of the Commission. In such a case, of what practical use would it be that the rates from Seattle to the point where the shipments entered Canada and to Detroit from the point where the shipments again entered the United States were entirely lawful if the carriers in the United States were nevertheless free to join in through rates from Seattle to Detroit, through Canada, which were free from the requirements of the Act? Fourth, railroads in the United States may join with carriers in foreign countries in secret joint through rates between points in foreign countries and points in the United States, inasmuch as these joint through rates would be free from the requirements of Paragraphs 6 and 7 of Section 6 of the Act relative to publishing and filing rates with the Commission. Fifth, a railroad in the United States may lawfully join with carriers in Mexico in the establishment and filing with the Interstate Commerce Commission of a rate of $1.33 per 100 lbs. on cow peas from Navojoa to San Francisco, but on arrival in San Francisco the railroad may collect from the consignee either more or less than that amount, and

the Interstate Commerce Commission would be powerless to do anything in the matter. If the collection of an unreasonable joint through international rate, filed with the Interstate Commerce Commission, does not involve a violation of Paragraph 5 of Section 1 of the Act, then the collection of a rate which was more or less than the rate named in the tariff filed with the Commission could not be held to be a violation of Paragraph 7 of Section 6 of the Act.

From these few illustrations, it should be apparent that if the Court below is correct in its conclusion that joint through international rates, when established, which include in them transportation within the United States by carriers subject to the Act, are free from the pertinent requirements of the Act, the Interstate Commerce Commission can exercise no effective control over the charges of the carriers in the United States engaged in the transportation of this country's foreign commerce. The law does not require the doing of a vain and futile thing, and determination of whether or not the rates maintained by the carriers within the United States to or from international boundary lines are lawful would be wholly vain and futile in seeking to determine whether the charges actually collected by railroads in the United States under international joint through rates are or are not lawful.

Dated, San Francisco,
October 11, 1930.

Respectfully submitted,

ERNEST CLEWE,

Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

State of California,
City and County of San Francisco.—ss.

Ernest Clewe being first duly sworn deposes and says: I am an attorney and counsellor of the Supreme Court of the United States; I am the attorney for the petitioner named in the foregoing petition for writ of certiorari; the allegations of said petitioner are true, as I verily believe; the points raised therein are in my opinion meritorious; said petitioner has not been filed for the purpose of delay.

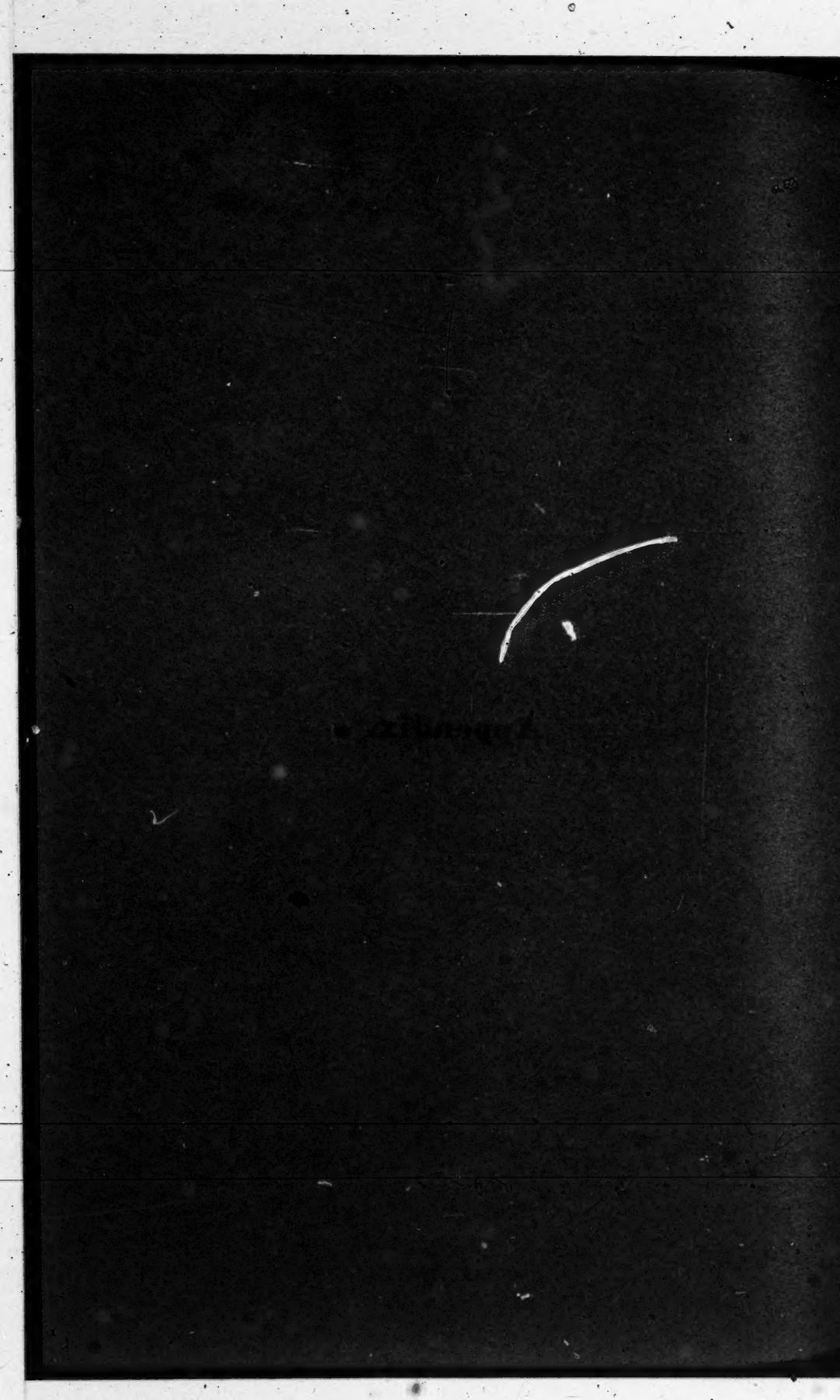
ERNEST CLEWE.

Subscribed and sworn to before me this 11th day of October, 1930.

(Seal) Mignon Jacobi,
Notary Public in and for the City and County of San Francisco, State of California.

(Appendix Follows.)

Appendix.



Appendix

Paragraphs 1, 2 and 5 of Section 1 of the Interstate Commerce Act, so far as germane to this proceeding, read as follows:

> "Sec. 1, Para. 1. That the provisions of this Act shall apply to common carriers engaged in the transportation of passengers or property wholly by railroad * * * from or to any place in the United States to or from a foreign country, but only in so far as such transportation * * * takes place within the United States.
>
> Sec. 1, Para. 2. The provisions of this Act shall also apply to such transportation of passengers and property, * * * but only in so far as such transportation or transmission takes place within the United States.
>
> Sec. 1, Para. 5. All charges made for any service rendered or to be rendered in the transportation of passengers or property * * * or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Paragraphs 1 and 7 of Section 6 of the Interstate Commerce Act read as follows:

> "Sec. 6, Para. 1. That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and points on the route of any other carrier

by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation and facilities defined in this Act.

"Sec. 6, Para. 7. No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor

shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariff than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."